

Exhibit F

Gore, John M.

From: Leah Aden <laden@naacpldf.org>
Sent: Thursday, August 11, 2022 12:46 PM
To: Gore, John M.; Parente, Michael A.; Cynthia D. Nygord; Chris Bryant; Allen Chaney; Antonio Ingram; John Cusick; Patricia Yan; Raymond Audain; Samantha Osaki; Sarah Gryll; Somil Trivedi; Stuart Naifeh; Adriel I. Cepeda Derieux; John A. Freedman; John Hindley; Jeffery A. Fuisz; Paula Ramer; Adam Pergament; Gina Colarusso; Mathias, Andrew A.; Wells, Erica H.; Barber, Hamilton B.; Hollingsworth, Jennifer J.; Moore, Mark C.; Ricard, Rhett D.; Wilkins, William W.; Diamaduros, Konstantine P; lcrum@burr.com; jtrinkley@burr.com; mburchstead@burr.com; tnicholson@elections.sc.gov; Rabon, Sheree M.; Rob Tyson; Lisle Traywick; La'Jessica Stringfellow; Kenny, Stephen J.
Cc: Leah Aden
Subject: RE: SC NAACP, et al v. Alexander - Supplemental expert report of Dr. Moon Duchin for the Congressional Case

**** External mail ****

Good afternoon Counsel –

We will not be withdrawing the 11-page supplemental expert disclosure of Dr. Duchin. Plaintiffs’ disclosure does not violate the Court’s Third Amended Scheduling order and subsequent modifications to that order by providing the supplemental report before the close of discovery on August 12, 2022. Instead, Plaintiffs’ disclosure is in full compliance with both this Court’s Third Amended Scheduling Order (ECF No. 210) and subsequent orders (e.g., ECF No. 261), as well as Federal Rule of Civil Procedure (“FRCP”) 26(e).

The Third Amended Scheduling Order does not prohibit parties from providing supplemental expert reports. While the Court’s orders required Plaintiffs to produce their initial expert reports by April 11, 2022 and their rebuttal reports by May 4, 2022, it also provided that “discovery shall be completed no later than August 12, 2022.” See ECF No. 261; see also ECF No. 210. Thus, those orders contemplate that other types of discovery like depositions and supplemental expert reports may take place before the end of discovery on August 12. See *Barnes v. District of Columbia*, 289 F.R.D. 1, 12 (D.D.C. 2012) (rejecting the argument that expert reports produced “on the day of the deadline” were untimely). Indeed, Plaintiffs’ experts cannot be expected to have remained silent through the remainder of expert discovery following their disclosures in April and May and when discovery ends in mid-August.

Moreover, Plaintiffs were required, and thus justified, to provide these supplemental expert reports pursuant to FRCP 26(e)(1). Under that rule, “[a] party who has made a disclosure . . . must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A). In the context of expert discovery, courts have repeatedly recognized that a party may supplement an expert report pursuant to FRCP 26(e)(1) “in response to questions or challenges to the expert’s opinion raised by the opposing party.” *Charles v. Sanchez*, No. 13-cv-193, 2015 WL 808417, at *9 (W.D. Tex. Feb. 24, 2015); see also *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, No. CV 00-1693, 2003 WL23715981, at *2 (D. Or. Jan. 21, 2003).

As Dr. Duchin’s supplemental report makes clear, it seeks to accomplish three things:

- make “two minor corrections” (in Section 4, pp. 6-7);
- “provide[] further context for the material in the earlier reports,” following “questions that were posed in [her] deposition of July 14, 2022” (in Section 1 pp. 1- 4 and appendix, pp. 8-11); and
- “contain[] data and metrics relating to the so-called ‘Jessamine’ map” (in Section 3, pp. 5-6).

With respect to the minor corrections, which were raised at Dr. Duchin's deposition, as Dr. Duchin's supplemental disclosure makes clear: "[t]hese corrections have no effect on [her] quantitative or qualitative conclusions from earlier reports." Thus, Defendants are not prejudiced under FRCP 37 by Dr. Duchin making minor corrections to her work as she is permitted to do under FRCP 26. *See* Fed. R. Civ. P. 37(c)(1) (exclusion of evidence is inappropriate if a failure to comply "was substantially justified or is harmless").

With respect to contextualizing data in her earlier reports, in Section 1 labeled "Distribution of BVAP," Dr. Duchin's supplemental disclosure makes clear much of this data is "the same data that is depicted in Figure 10 from [her] April 11 report, but in fuller statewide context." Defendants cannot be prejudiced under FRCP 37 by Dr. Duchin providing the same data as Defendants have had access to, but that Dr. Duchin presents in a different light, following Defendants' deposition questioning.

Similarly, in Section 2 labeled "performance by Black voters' candidates of choice," Dr. Duchin makes clear that she is giving more "detailed vote shares, and not just counting the number of outcomes over 50%" for the candidates of choice, as her previous disclosures do, such that in her supplementation, she is merely providing "additional detail for the effectiveness analysis presented in Section 7 of the April 11 report." Defendants cannot be prejudiced under FRCP 37 by Dr. Duchin providing the same data as Defendants have had access to, but that Dr. Duchin presents in a different light, following Defendants' deposition questioning.

With respect to the Jessamine map, as Defendants know, key legislative counsel-staff, Andy Fiffick, testified that he received approximately four emails from the National Republican Redistricting Trust (NRRT) at Mr. Fiffick's personal (non-Senate) email address. At least two of these emails contained the Jessamine map, which to date has never been publicly posted on the Senate's website. As Mr. Fiffick testified, the public would have to obtain this map by FOIA. Dr. Duchin previously analyzed all of the seven publicly submitted maps posted on that Senate's website, as well as Senator Harpootlian's map introduced as an amendment. Through formal discovery in this case, Plaintiffs received the Jessamine map as a block equivalency file buried in discovery in this case. And Plaintiffs were able to confirm that that map was the same map provided by NRRT to legislative staff—after issuing a subpoena, initiating separate litigation to compel its production, and thereafter receiving that map from NRRT on July 29. Dr. Duchin thus lacked an opportunity to analyze the Jessamine map until recently. And in each and every report she has submitted in this case, Dr. Duchin has reserved the right to "continue to supplement [her] report in light of additional facts, testimony and/or materials that may come to light." The non-public Jessamine map provided to Senate staff and considered by them as the Senate considered congressional redistricting—but which Plaintiffs have only recently had access to—falls within the scope of information Dr. Duchin is justified in reviewing and making supplemental findings about under FRCP 26.

Ultimately, Plaintiffs would not object if Defendants seek to reopen Dr. Duchin's deposition for the limited purpose of questioning her about her supplemental report.

Plaintiffs further reserve the right to move the Court for the opportunity for Dr. Bagley to supplement his report based on the non-public record of the process that led to the adoption of the congressional plan as learned via depositions of legislators and their staff, and third parties, depositions which remain ongoing via August 19. At this time, Plaintiffs do not intend to supplement the expert reports of Drs. Liu, Imai, or Ragusa.

Sincerely,

leah

Leah C. Aden
Deputy Director of Litigation



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Sent: Wednesday, August 10, 2022 11:39 AM

To: Leah Aden <laden@naacpldf.org>; Parente, Michael A. <MParente@nexsenpruet.com>; Cynthia D. Nygord <cnygord@robinsongray.com>; Chris Bryant <chris@boroughsbryant.com>; Allen Chaney <achaney@aclusc.org>; Antonio Ingram <aingram@naacpldf.org>; John Cusick <jcusick@naacpldf.org>; Patricia Yan <pyan@aclu.org>; Raymond Audain <raudain@naacpldf.org>; Samantha Osaki <sosaki@aclu.org>; Sarah Gryll <sarah.gryll@arnoldporter.com>; Somil Trivedi <strivedi@aclu.org>; Stuart Naifeh <snaifeh@naacpldf.org>; Adriel I. Cepeda Derieux <ACepedaDerieux@aclu.org>; John A. Freedman <john.freedman@arnoldporter.com>; John Hindley <john.hindley@arnoldporter.com>; Jeffery A. Fuisz <jeffrey.fuisz@arnoldporter.com>; Paula Ramer <paula.ramer@arnoldporter.com>; Adam Pergament <adam.pergament@arnoldporter.com>; Gina Colarusso <gina.colarusso@arnoldporter.com>; Mathias, Andrew A. <AMathias@nexsenpruet.com>; Wells, Erica H. <EWells@nexsenpruet.com>; Barber, Hamilton B. <HBarber@nexsenpruet.com>; Hollingsworth, Jennifer J. <JHollingsworth@nexsenpruet.com>; Moore, Mark C. <MMoore@nexsenpruet.com>; Ricard, Rhett D. <RRicard@nexsenpruet.com>; Wilkins, William W. <BWilkins@nexsenpruet.com>; Diamaduros, Konstantine P <KDiamaduros@nexsenpruet.com>; lcrum@burr.com; jtrinkley@burr.com; mburchstead@burr.com; tnicholson@elections.sc.gov; Rabon, Sheree M. <SRabon@nexsenpruet.com>; Rob Tyson <rtyson@robinsongray.com>; Lisle Traywick <ltraywick@robinsongray.com>; La'Jessica Stringfellow <lstringfellow@robinsongray.com>; Kenny, Stephen J. <skenny@jonesday.com>

Subject: RE: SC NAACP, et al v. Alexander - Supplemental expert report of Dr. Moon Duchin for the Congressional Case

[Caution: EXTERNAL EMAIL]

Counsel:

Dr. Duchin's supplemental expert report—which was served nearly four months after Dr. Duchin's original report, nearly one month after her deposition, and only three days before the close of discovery, all with no consultation with Defendants' counsel—is improper and violates the rules.

Federal Rule 26(e)(2) provides:

“For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition.”

Rule 26(e)(2) does not permit supplementation to “cover failures or omissions because the expert did an inadequate or incomplete preparation.” *Akeva LLC v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002); *see also Palmetto Pharms. LLC v. AstraZeneca Pharms. LP*, 2012 WL 4369259, *2 (D.S.C. July 18, 2012). “To construe supplementation to apply whenever a party wants to bolster or submit additional expert opinions would wreak havoc in docket control and amount to unlimited expert preparation.” *Akeva LLC*, 212 F.R.D. at 310; *see also Palmetto Pharms. LLC*, 2012 WL 4369259, *2.

Dr. Duchin's supplemental expert report runs afoul of these rules. Dr. Duchin's supplemental expert report is not limited to “information included in the report” or “information given during the expert's deposition.” *Palmetto Pharms. LLC*, 2012 WL 4369259, *3. Instead, Dr. Duchin's supplemental report includes entirely new analysis and opinions, including related to the Jessamine plan. The report therefore “is not proper supplementation under Rule 26(e)” and should be stricken. *Id.*

We believe that it is in all parties' best interest not to burden the court with this issue. We therefore request that Plaintiffs withdraw Dr. Duchin's supplemental expert report. Please notify us no later than noon on Thursday, August 11, whether you will do so. We reserve our rights to seek relief from the court if we do not hear from you.

Finally, we also will object to any supplemental report from any of Plaintiffs' other witnesses that likewise violates the rules. Please also advise us by noon on Thursday if Plaintiffs are planning to submit any more supplemental expert reports.

Best,
John

John M. Gore
Partner

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From: Leah Aden <laden@naacpldf.org>

Sent: Tuesday, August 9, 2022 6:04 PM

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Cc: Leah Aden <laden@naacpldf.org>

Subject: RE: SC NAACP, et al v. Alexander - Supplemental expert report of Dr. Moon Duchin for the Congressional Case

**** External mail ****

Counsel –

Please find attached a supplemental expert report of Dr. Moon Duchin.

Thank you,

leah

Leah C. Aden
Deputy Director of Litigation



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Cc: Leah Aden <laden@naacpldf.org>

Subject: RE: SC NAACP, et al v. Alexander - Expert rebuttal report of Dr. Moon Duchin for the Congressional Plan

Counsel,

Attached is the expert rebuttal report of Dr. Moon Duchin with respect to the Congressional Plan.

Thank you.

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From: Leah Aden

Sent: Monday, April 11, 2022 9:52 PM

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Cc: Leah Aden <laden@naacpldf.org>

Subject: RE: SC NAACP, et al v. Alexander - Expert report of Dr. Moon Duchin for the Congressional Plan

Counsel,

Attached are the expert report and CV of Dr. Moon Duchin with respect to the Congressional Plan.

Thank you.

Leah Aden

Deputy Director of Litigation

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